TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~487~~ 235 54

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

ABIJAH TARBLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED JULY 19, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 467.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

ABIJAH TARBLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

INDEX.

	Original.	Print.
Citation and service	1	1
Writ of error	3	1
Petition for certiorari	5	2
Writ of certiorari	14	5
Return to writ of certiorari	15	5
Petition for habeas corpus	22	8
Writ of habeas corpus	25	9
Return to writ of habeas corpus	26	10
Deposition of H. L. Stone	30	11
Israel Conroe	33	12
Marius Brodahl	37	13
Henry L. Stone, recalled	39	14
Edward Tarble, alias Frank Brown	39	14
James Paul	46	16
Abijah Tarble	48	17
Elisha Tarble	51	18
Edward Tarble, recalled	52	18
Israel Conroe, recalled	53	19
Mrs. Olive Tarble	54	19
Melissa Greenman	56	20
Order of commissioner	57	20
Opinion of supreme court	61	22
Judgment of supreme court	79	32
Clerk's certificate	80	32

1 UNITED STATES OF AMERICA,
State of Wisconsin, ss:

To Abijah Tarbel, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Wisconsin, in the matter of the petition of Abijah Tarbel for a writ of habeas corpus, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable L. S. Dixon, chief justice of the supreme
2 court of the State of Wisconsin, this 30th day of June, A. D. one thousand eight hundred and seventy.

L. S. DIXON,
Chief Justice Supreme Court Wisconsin.

(Indorsed:) United States of America. Supreme Court. In the matter of the petition of Abijah Tarbel for a writ of habeas corpus. Citation.

Due service of a copy of the within citation admitted this 30th day of June, 1870.

P. L. & J. C. SPOONER,
Att'ys for Petitioner.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of the State of Wisconsin, before you, in re Abijah Tarble, a manifest error hath happened, to the great damage of the United States, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this ninth day of April, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fourth.

EDWARD KURTZ,
Clerk U. S. Circuit Court for Dist. of Wisconsin.

Allowed by me—

L. S. DIXON,
Chief Justice Sup. C't Wis.

4 To the Supreme Court of the United States:

The return to the within writ appears by the schedule thereto

annexed. The answers of the justices of the supreme court of the State of Wisconsin.

[SEAL.] LA FAYETTE KELLOGG,
Clerk Sup. C't Wis.

(Indorsed:) In re Abijah Tarble. Writ of error.
Filed Apr. 12, 1870.

L. F. KELLOGG,
Clerk Sup. C't Wisconsin.

5 Pleas before the supreme court of the State of Wisconsin at a term thereof begun and held at the capitol in the city of Madison, the seat of government of said State, on the Tuesday next preceeding the second Wednesday in January, in the year of our Lord one thousand eight hundred and seventy:

Present, the Hon. Luther S. Dixon, chief justice; the Hon. Orsamus Cole and the Hon. Byron Paine, associate justices; La Fayette Kellogg, clerk.

Be it remembered that heretofore, to wit, on the eleventh day of September, in the year of our Lord one thousand eight hundred and sixty-nine, came Henry L. Stone, 1st lieut. U. S. A., and recruiting officer, by Messrs. W'm F. and H. Vilas, his attorneys, and filed his certain petition and motion for a writ of certiorari in the words and figures following; that is to say:

In supreme court.

STATE OF WISCONSIN, *Dane County, ss:*

6 Henry L. Stone, being duly sworn, says that he is a first lieutenant in the army of the United States, and is now, and for over 3 months last past has been, by due order of the General of the Army, detailed as a recruiting officer at Madison, Wisconsin; that, as he is informed and believes, on or about the 10th day of August, A. D. 1869, one Abijah Tarble made petition to R. J. Chase, esq., court commissioner of the circuit court for Dane County, in the usual form, for a writ of habeas corpus for the discharge from the custody and military restraint of this deponent, as such recruiting officer as aforesaid, of one Edward Tarble, alias Frank Brown; and in said petition the said petitioner alleged as the cause or pretence of the restraint of said Edward Tarble, alias, had, in the month of July, A. D. 1869, enlisted into the military service of the United States, but it was alleged that such enlistment and restraint by this deponent was illegal, in this, that at the time of said enlistment said Edward Tarble, alias, was not of the age of eighteen years, and his enlistment was without the knowledge or consent of the petitioner, who was the father of said Edward Tarble, alias.

That upon such petition the said R. J. Chase, esq., court com-
7 missioner, issued a writ of habeas corpus, in the usual form, to this deponent; to which writ this deponent, on the same day, made return, producing the body of the said Edward Tarble, alias, and protesting that the said commissioner had no jurisdiction of the matter; that the cause of his detention by this deponent was, that, by the authority aforesaid vested in this deponent, he held custody of said Edward Tarble, alias, because that on the 27th day of July, A. D. 1869, he had, by the name of Frank Brown, duly enlisted, according to law and the regulations of the army, as a soldier in the army of the United States of America for the period of five years, unless sooner discharged

by proper authority, and duly took the oath required by law and such regulations, and thereby swore and declared that he was of the age of 21 years, and thereby procured himself to be so enlisted by this deponent, and that he was on the same day duly mustered into the U. S. service; and because that subsequently the said soldier deserted the said service, and, having been retaken, was then in deponent's custody in confinement as a prisoner, under charges of desertion, awaiting trial by the proper military authorities.

That the said petitioner replied in substance to the said return of this deponent, by denying, on information and belief, that said soldier
8 was ever legally enlisted, or that he swore or declared that he was of the age of 21 years, or that he thereby procured himself to be enlisted, and also by alleging that said soldier was under the age of 18 years, that he was enticed into said enlistment, which was without the petitioner's knowledge or consent; and that he was advised and believed that said soldier was not, and never had been, a deserter, and he had no knowledge or information as to his being under charges of desertion.

That on the 12th day of August, 1869, a hearing of the said matter was had before said commissioner, when, to support his return, this deponent's counsel, W. F. Vilas, called as a witness this deponent, who testified in substance that on the 27th of July, 1869, the said Edward Tarble, alias, presented himself to deponent and desired to enlist; was asked by deponent the ordinary questions as to age; replied that he was 21 years and one month of age; then signed the usual and customary oath and declaration prescribed by the regulations of the army in such case, and made oath before this deponent in due form, first having himself read the said oath and declaration. Said enlistment oath and declaration, the same having been executed in triplicate, was given in evi-
dence at that time to said commissioner, and deponent further
9 testified that said recruit was then examined and was duly mustered into the service of the United States.

That the oath taken was the same that has been in use, to deponent's knowledge, more than eight years in the army, and the same prescribed in the army regulations.

That subsequently, having applied for leave of absence and been refused, on the 28th day of July, the said recruit deserted.

That on the 9th of August, 1869, he surrendered himself, being in citizen's clothes, and was put under guard, and charges of desertion were immediately forwarded to the superintendent of the recruiting service for the district of ———, the said Brown having been before reported as a deserter to the Adj't Gen'l of the army and to said superintendent.

Lance Sergeant Israel Conroe was then called as a witness, who testified substantially the same as the foregoing, having been present at the time of enlistment of said recruit.

And also Marius Brodahl was called as a witness to the same facts, which was substantially the evidence produced by deponent in support of his said return.

And thereupon, in support of the petition, the petitioner introduced the said soldier, Edward Tarble, alias, who testified, among other
10 things, ag'st this deponent's objection, by ruling of said com'er, to which deponent excepted, that he was 17 years old on the 20th day of February, 1869, also under like objection ruling & exception that on the day before his enlistment he told the said lance sergeant, Israel Conroe, that he was of the age of 17 years, & that he could not be enlisted unless he told this deponent, the recruiting officer, that he was of the age of 21. And, among other things, he further testified that he told

this deponent, as before stated by deponent, that he was 21 years and one month of age, and that he so told deponent to deceive deponent, and with the view of procuring his enlistment. And under this deponent's objection he also testified by permission of said commissioner, to which deponent excepted, that his parents did not consent to or have knowledge of his enlistment. And against this deponent's objection, by the ruling of the said commissioner, the said petitioner also called as witnesses, himself, Abijah Tarble, Elisha Tarble, brother of said soldier, Olive Tarble, wife of said petitioner & mother of said soldier, & Melissa Greenman, sister of said soldier, to testify that said soldier was under the age of 18 years, & that his parents did not consent to his enlistment.

11

The cause was then argued, and it was urged upon the side of this deponent that the oath of enlistment taken by the recruit, Edward Tarble, alias, as aforesaid, was conclusive as to his age, and that all other evidence on the subject was immaterial and should be disregarded; & hence the contract of enlistment was valid ag'st the said soldier & his father, the petitioner; and further urged that the said recruit, being guilty of desertion and under charges therefor, and in confinement as a military prisoner, was amenable for trial before the military authorities only, and the commissioner had no jurisdiction or lawful right to interfere in the course of the military adjudication of such offence. But the said court commissioner overruled all said objections and made an order discharging the said Edward Tarble, alias, from the custody & control of this deponent.

Wherefore this deponent, on report to his superior officers, has been duly ordered to present the said case to the said supreme court of this State, feeling aggrieved by the said order of said court commissioner, and this deponent has been ordered to present the said case to this court, with all reasonable dispatch, in order that the questions above presented may be adjudicated & fully settled by the decision of this court.

12

Wherefore he prays that a writ of certiorari may be issued out and under the seal of this honorable court, returnable according to law, to the end that said proceedings may be reviewed by the court & reversed for the errors aforesaid.

HENRY L. STONE,
1st Lieut. U. S. A., Rec't'g Officer.

Subscribed & sworn to before me this 9th day of Sept., 1869.
W'M F. VILAS,
Notary Public, Wis.

And on the above affidavit the said respondent, Henry L. Stone, by his attorneys, moves the said court for a writ of certiorari in the matter aforesaid, to be issued out of and under the seal of this honorable court to be directed to R. J. Chase, court commissioner for Dane County, returnable according to law & the rules & practice of this court.

W'M F. AND H. VILAS,
Attorneys for Resp'd't.

13

Upon the filing of which said petition and motion the following proceedings were had in said court, to wit:

IN THE MATTER OF THE PETITION OF ABIJAH Tarble for a writ of habeas corpus, &c., on certiorari to R. J. Chase, court commissioner. } Certiorari.—On petition of Henry L. Stone, U. S. A.

And now, at this day, came the said petitioner, by Messrs. W'm F. and

H. Vilas, his attorneys, and filed his petition herein, and moved the court for a writ of certiorari, as prayed for in and by his said petition; which said motion having been argued, and being by the court here fully understood, it is ordered that the said motion be, and the same is hereby, allowed, and that a writ of certiorari issue, as prayed for, returnable to the next term of this court.

Whereupon a writ of certiorari was issued out of and under the seal of said court in the words & figures following, that is to say:

14 STATE OF WISCONSIN,
In Supreme Court, ss:

The State of Wisconsin to R. J. Chase, esq., court commissioner of the circuit court for the county of Dane:

Whereas we have been informed by the petition of Henry L. Stone, 1st lieut. of the United States Army, that certain proceedings were had before you upon petition of Abijah Tarble, for the discharge of his son Edward Tarble, alias Frank Brown, upon writ of habeas corpus, under and by virtue of the revised statutes of said State, wherein an order was made by you for the discharge of said Edward Tarble, alias, from the custody and control of said Henry L. Stone, and wherein certain errors, as it is alleged, have intervened, and we being willing, for certain reasons, to be certified of such proceedings, if any such were had before you, do command you, and strictly enjoin you, that you do certify and return those proceedings, with all things appertaining thereto, unto our justices of our supreme court of the State of Wisconsin, at Madison, the seat of government of said State, on Tuesday pre-
15 ceding the second Wednesday of January, A. D. 1870, as fully and amply as the same remain before you, so that our said justices may further cause to be done thereupon what of right and according to law ought to be done; and have you then and there this writ.

Witness the Hon. Luther S. Dixon, chief justice of our said court at Madison, this 11th day of September, A. D. 1869.

[SEAL.] Attest: LAFAYETTE KELLOGG,
Clerk Supreme Court Wis.

And afterwards, to wit, on the eighth day of October, in the year aforesaid, came R. J. Chase, esq., the court commissioner, to whom said writ of certiorari was directed, & made return thereto in the words and figures following; that is to say:

STATE OF WISCONSIN, *Dane County, ss:*

I, R. J. Chase, court commissioner in and for Dane County, to whom the foregoing writ of certiorari is directed, do certify and return
16 the proceedings hereunto annexed to the justices of the supreme court of the State of Wisconsin. Such proceedings were had, evidence taken, order made, as fully stated in accompanying papers.

Dated Madison, Wis., Oct. 7, 1869.

R. J. CHASE,
Court Commissioner Dane Co., Wis.

Copy letter referred to in the evidence of Abijah Tarble.

R. J. CHASE,
Court Com'r.

OSWEGO, *March 23d*, 1852.

MY DEAR MOTHER: I now take this opportunity to inform you all

how I get along. I am well, and I hope these few lines will find you all the same. I arrived at Oswego on Wednesday morning, 17th. I am to uncle Jacob's. They are all well. I have shipped on a schooner called the Acorn, for cook. I don't know what I shall have a month. The captain says he will try me one trip and see how he likes me, and then he will tell me how much he can give me a month. He is a nice
17 young man. He is about 22. You may think that I done wrong to go away from home, but I think I shall do better than I should if I had stayed at home. I shall keep good company, save my earnings, and tend to my own business. I like aunt Mary's folks very well. They say that I must make myself to home. I think a good deal of the boys. Mires is married and got a boy. Charley has got a tobacco stores, 4 hands to work for him. Aunt Mary says you must give that little fellow a handsome name. She says that I and Elisha have got homely names. I should like to see you all. I shan't be in Oswego but a few days longer. The captain says that he wants to get out next week. You must not trouble yourself about me, but cheer up and keep good spirits. I shan't drink nothing stronger than coffee and tea. There is five hands on the Acorn besides myself. Aunt Mary and the rest send their best respects to you all. You must write soon, if you don't I won't get your letter. I feel lonesome sometimes, but I think there is a good time coming.

Adars. Yours, resp.,

OLIVE TARBE.

From Joy Tarble, Oswego. Give my best resp. to all enquiring friends.

18 [Vignette.]

STATE OF WISCONSIN,
Town of Madison:

I, Frank Brown, born in Jefferson County, in the State of New York, aged twenty-one years, and by occupation a farmer, do hereby acknowledge to have voluntarily enlisted this twenty-seventh day of July, 1869, to serve as a soldier in the army of the United States of America, for the period of five years, unless sooner discharged by proper authority; do also agree to accept such bounty, pay, rations, and clothing as are or may be established by law. And I, Frank Brown, do solemnly swear, that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whomsoever; and that I will observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war.

(S'g'd) FRANK BROWN.

Sworn and subscribed to at Madison, Wis., this 27th day of July, 1869, before

1ST LIEUT. HENRY L. STONE, U. S. A.,
Recruiting Officer.

I certify, on honor, that I have carefully examined the above-named recruit agreeably to the general regulations of the army, and that, in my opinion, he is free from all bodily defects and mental infirmity which would in any way disqualify him from performing the duties of a soldier.

(S'g'd) HENRY L. STONE,
1st Lieutenant U. S. A., Rec'ŭg Officer.

I certify, on honor, that I have minutely inspected the recruit Frank Brown, previously to his enlistment, and that he was entirely sober when enlisted; that, to the best of my judgment and belief, he is of lawful age; and that, in accepting him as duly qualified to perform the duties of an able-bodied soldier, I have strictly observed the regulations which govern the recruiting service. This soldier has blue eyes, light hair, light complexion; is five feet six inches high.

(S'g'd) HENRY L. STONE,
1st Lieutenant U. S. A., Recruiting Officer.

(A. G. O., No. 73.)

Assigned to the regiment U. S. Army.

Superintendent.

A true copy:

HENRY L. STONE.
1st Lieut. U. S. A., Recruiting Officer.

19 *Declaration of recruit.*

I, Frank Brown, desiring to volunteer as a soldier in the army of the United States for the term of five years, do declare that I am twenty-one years and one months of age; that I have neither wife nor child; that I have never been discharged from the United States service on account of disability or by sentence of a court-martial, or by order before the expiration of a term of enlistment; and I know of no impediment to my serving honestly and faithfully as a soldier for five years.

Given at Madison, Wisconsin, the 27th day of July, 1869.

(S'g'd) FRANK BROWN.

Witness:

(S'g'd) HENRY L. STONE,
1st Lieut. U. S. A., Rec't'g Officer.

Consent in case of minor.

I, do certify that I am the of ; that the said is years of age; and I do hereby freely give my consent to his enlisting as a soldier in the army of the United States for the period of five years.

Given at the day of .

Witness:

(Indorsed:) No. 27. Frank Brown, enlisted at Madison, Wis., on the 27th day of July, 1869, by 1st Lieut. Henry L. Stone, U. S. A. Assigned to the regiment of U. S. Army. enlistment; last served in comp'y ( ) reg't of . Discharged , 18 .

Here follow printed directions, copied on next page.

Filed Aug. 12, 1869, and referred to in testimony of Lieut. H. A Stone.

R. J. CHASE,
Court Com'r.

20 *Directions.*

Enlistments must, in all cases, be taken in triplicate. The recruiting officer will send one copy to the Adjutant General with his monthly

accounts, a second to the superintendent with his monthly returns, and a third to the depot at the time the recruits are sent there. In cases of soldiers re-enlisted in a regiment, or of regimental recruits, the third copy of the enlistment will be sent at its date to regimental headquarters for file.

Superintendents will endorse on the copy for the Adjutant General the regiment to which the recruit is assigned, in all enlistments made subsequent to December 31, 1865, before forwarding it, in compliance with paragraph 919, Revised Army Regulations; provided that the time required to accomplish this shall not exceed four months, in which case it will be forwarded with this information.

The names of all men enlisted during the month will appear upon the monthly return, required by the paragraph above referred to, and of such as are not assigned, a muster and descriptive roll will be forwarded in lieu of the copy of enlistment.

Enlistment papers detained for assignment of the recruit will be forwarded with subsequent returns, with the names entered thereon
21 in red ink, but will not be enumerated with current enlistments as having been enlisted during the month.

The death, desertion, or discharge of a recruit before assignment will be noted upon the enlistment, which will be forwarded to this office with the first subsequent returns.

22 THE STATE OF WISCONSIN, *Dane County, ss:*

To R. J. Chase, court commissioner, Dane Co., Wis.:

The petition of Abijah Tarble respectfully shows that Edward Tarble, alias Frank Brown, is imprisoned and restrained of his liberty by Lieut. H. A. Stone, U. S. A., and that the said Edward Tarble, alias Frank Brown, is so confined and restrained in the city of Madison, in said county and State; that the said Edward Tarble, alias Frank Brown, is not committed or detained by virtue of any process, judgment, or order of any competent tribunal of civil or criminal jurisprudence, or by virtue of any execution issued upon such order or judgment. And your petitioner further shows that, according to the best of the knowledge and belief of your petitioner, the cause or pretense of the aforesaid confinement or restraint of the said Edward Tarble, alias Frank Brown, is as follows: That the said Edward Tarble, alias Frank Brown, was, on or about the 20 day of July, A. D. 1869, enlisted and mustered into the military service of the United States at Madison aforesaid; and your petitioner further shows that such confinement is
23 not by virtue of any warrant, order, or process, to the knowledge or belief of your petitioner; and your petitioner further says that he is, and for the five years last past has been, a resident of the said county of Dane; that the said Edward Tarble, alias Frank Brown, is the son of your petitioner, and has resided with him in said county, and was born on the 20th day of February, 1852, and is not now eighteen years of age; that such alleged enlistment and mustering above mentioned was without the knowledge, consent, or approval of your petitioner, and against his will; that your petitioner is, and during the times herein mentioned has been, lawfully entitled to the custody, care, and services of the said Edward Tarble, alias Frank Brown; and your petitioner states and shows that he is advised by Spooner, Lamb, and Spooner, his counsel, residing at Madison aforesaid, and verily believes, that the confinement and restraint of the said Edward Tarble, alias Frank Brown, as aforesaid, is illegal, and that such illegality consists

in this: that at the time of such alleged enlistment and mustering the said Edward Tarble, alias Frank Brown, was under the age of eighteen years and under the age of twenty-one years, and such alleged
24 enlistment and mustering was without the knowledge, consent, or approval, at any time, of your petitioner, the parent of said Edward Tarble, alias Frank Brown:

Wherefore your petitioner, for himself, on behalf of said Edward Tarble, alias Frank Brown, prays a writ of habeas corpus to the end that the said Edward Tarble, alias Frank Brown, may be discharged from custody.

Dated Madison, Dane Co., Wis., 10th August, 1869.

ABIJAH TARBLE.

SPOONER, LAMB, AND SPOONER,
Att'ys for Petitioner.

STATE OF WISCONSIN, *County of Dane, ss:*

Abijah Tarble, being duly sworn, says he is the petitioner above named; that he has heard read the foregoing petition by him subscribed, and that he knows the contents thereof, and that the same are true to his own knowledge, except as to matters therein stated on information and belief, and as to those matters, he believes it to be true.

ABIJAH TARBLE.

Sworn to and subscribed before me this 10th day of August, A. D. 1869.

R. J. CHASE,
Court Commissioner Dane County, Wis.

25 In the name of the State of Wisconsin.

To Lieut. H. A. Stone, U. S. A.:

You are hereby commanded to have the body of Edward Tarble, alias Frank Brown, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Edward Tarble, alias Frank Brown, shall be called or charged, before R. J. Chase, esq., a court commissioner in and for the county of Dane, State of Wisconsin, at his office in said city of Madison, immediately after receipt of this writ, to do and receive what shall then and there be considered concerning the said Edward Tarble, alias Frank Brown; and have you there and then this writ.

Witness my hand at Madison, Wisconsin, this 10th day of August, A. D. 1869.

R. J. CHASE,
Court Commissioner Dane County, Wis.

26 Protesting that his honor the commissioner signing the within writ has no jurisdiction in the premises to issue this writ, I hereby return the within writ, and have in my custody, and herewith produce, the body of the within-named Frank Brown, alias; and I further return, as the authority and true cause for such custody, that I am a first lieutenant of the United States Army, and, by due authority, am detailed as recruiting officer at the city of Madison, and as such officer, and by due authority vested in me, have custody and command of all soldiers recruited for the army at said Madison; that, on the 27th day of July, A. D. 1869, the within-named Frank Brown, by that name, duly enlisted, according to law & the regulations of the army, as a soldier in the army

of the United States of America for the period of five years, unless sooner discharged by proper authority, & then duly took the oath in such case required by law and the said regulations, and in and by said oath solemnly swore and declared that he was of the age of 21 years, & thereby procured himself to be so enlisted by the undersigned as such recruiting officer, & that he was on said day duly mustered into the service of the United States; that subsequently said Brown deserted
27 the said service, & being retaken, is now in my custody as such officer, & in confinement as a prisoner, under charges of desertion, awaiting trial by the proper military authorities.

HENRY L. STONE,
1st Lieut. U. S. A., Recruiting Officer.

IN THE MATTER OF THE APPLICATION OF Abijah Tarble for a writ of habeas corpus for the discharge of Edward Tarble, alias Frank Brown. } Before R. J. Chase, esq., court commissioner.

The said petitioner, replying to the matters and things stated in the return of Henry L. Stone, lieut., & to the writ of habeas corpus served on him herein, on information & belief, denies that said Edward Tarble, alias Frank Brown, was ever duly or lawfully enlisted or mustered as a soldier in the army of the United States, or that he swore or declared on oath that he was of the age of 21 years, or that he thereby procured himself to be enlisted in said army; but, on the contrary, on the said 27 July, 1869, the said Edward Tarble, alias Frank Brown,
28 was under the age of 18 years, & is still, & was only 17 years of age on the 20 Feb'y, 1869, &, on information & belief, that he was enticed into said pretended enlistment, which & said alleged mustering was without the knowledge, consent, or approval ever given by your petitioner, his father; that the only oath then taken by said Edward was the oath of allegiance, and he is advised & believes that said Edward is not and never has been a deserter from said military service, or liable in any way as such; that he was absent in the State of Iowa after said 27 July, 1869, but voluntarily returned 9 Aug., 1869, & he has no knowledge as to his being under charges of desertion or imprisonment other than those contained in said return, & therefore leaves said respondent to his proofs.

ABIJAH TARBLE.

Subscribed & sworn to before me this 12 Aug., 1869.

F. J. LAMB,
Court Commissioner Wis.

29 IN THE MATTER OF THE APPLICATION OF Abijah Tarble for a writ of habeas corpus for the discharge of Edward Tarble, alias Frank Brown.

On this 10th day of August, 1869, Lieut. H. A. Stone produced before the commissioner the body of Edward Tarble, alias Frank Brown, and made and filed his return to the writ of habeas corpus issued herein, and on the same day and at the same time the petitioner filed his reply thereto.

Whereupon, upon motion and by consent of the counsel for petitioner and the counsel for the respondent, the hearing of said motion was adjourned until August 12, 1869, at 2 o'clock p. m., at which time, and at

the office of said com'r, in the city of Madison, said Lieut. H. A. Stone was ordered to produce the body of the prisoner, & meanwhile keep him in custody.

AUG. 12, 1869, 2 o'clock p. m.—At this personally brought before the commissioner the said Edward Tarble, alias Frank Brown, and thereupon the said Henry L. Stone introduced, on the issue joined therein, following testimony:

30 HENRY L. STONE, being first duly sworn, testified as follows:

The prisoner presented himself for enlistment during the forenoon of July 27. He was asked the customary questions as to age.

(Objected to. Testimony taken under objection.)

And after having read the declaration as regards to his age, and as to whether he was married or single, he then signed it. After being examined physically by me, he was sworn into the service of the United States for the period of five years by me. He replied, when the declaration was read over to him, that he was twenty-one years of age. Lance Sergeant Israel Conroe and Marius Brodahl, a private, were present of the recruiting party, at time of his enlistment. He read the whole paper; I saw him read it. That is the paper.

(Paper shown witness. Paper being declaration & enlistment, paper introduced & received in evidence.)

He sat down to table and appeared to be reading it. He stated his age to be 21 years and one month, and such statement on back of enlistment paper was inserted at his request. Enlistment papers was in triplicate—all alike. He signed them all; one has been sent to Adjutant General U. S. A.; the other to sup't of general recruiting service at St. Louis, B'v't Maj. Gen'l Hoffman at St. Louis. The recruit in no way gave me any intimation that he was under 21 years.

31 The manner in which he was enlisted was in accordance with the regulations of the army. The oath of enlistment in evidence on papers produced, is the regular oath of enlistment, known by me to be such for eight years. Has been no change to my knowledge or belief. Is prescribed by army regulations. After he signed enlistment papers he signed clothing receipt roll, and ordered his clothes. He was afterwards mustered into the service of the United States. Within half an hour after his enlistment, he absented himself without leave.

(Objection to any evidence to show that prisoner was a deserter. Taken under objection.)

Was missing at 12 m., noon, on the 28th of July, 1869. He had applied to sergeant for leave to go home, and been refused. About 9th of present month, I next saw him. He came back about noon of that day; was dressed in citizen's clothes. After he returned, I had him change his clothes, and put him under guard as a prisoner. I immediately preferred charges for dessertion against him. I had before that time reported him to the Adj't Gen'l as a deserter, and also to the sup't of gen'l recruiting service. Forwarded the charges of dessertion to sup't of recruiting service. Since that time I have held him under

32 guard as a prisoner.

Ques. Where does the military court-martial for this district convene?

(Objected to. Objection sustained.)

General Pope is the department commander of this department, head quarters at Detroit.

Cross-examined:

No oath was administered except the oath in evidence.

Ques. When he absented himself, was his clothing returned all but one article?

(Objected to. Overruled.)

Answer. It was not. His pants, blouse and cap were returned. His shoes and stockings were not returned. I don't know whether he got shoes or not; he signed for them. Sheriff brought back articles returned. He returned voluntarily.

Ques. Was he delivered you by an officer?

Ans. He was not; delivered himself to me. There has been no account presented to the government for his apprehension as a deserter.

(General objection to all of this testimony, and taken under objection.)

It is a fact that so far as the records of my office show, and so far as I know, he voluntarily returned to my office. He received no advance pay or bounty. I examined him physically, and came to conclu-
33 sion, from his personal appearance, that he was over (21) twenty-one years of age. I have no official information that the charges of desertion have been received and acted upon. I first saw this boy the day he enlisted in my office. Don't remember of seeing him before.

HENRY L. STONE,
1st Lieut. U. S. A.

Subscribed and sworn to before me this 12th day of August, 1869.

R. J. CHASE,
Court Commissioner Dane Co.

ISRAEL CONROE, being first duly sworn, said:

I am sergeant; lance sergeant in the army, and on recruiting service here under command of Lieut. Stone, and was present when prisoner was recruited. He came into the office the day previous to the day he enlisted, and enquired of me, if we were enlisting for the regular army; I told him that we were. He asked me what age they had to be. I told him twenty-one. He then asked me if a few days or a few months would make any difference. I told him that it would; that if he lacked half a day of being twenty-one, we would not enlist him. That was all I said to him at that time. He turned and went out of office. I saw him again that afternoon, and next morning. At time of enlistment
34 he came into office. I don't know whether Lieut. Stone had seen him prior to enlistment or not. Came into office; said he wished to enlist. Lieut was in office at time, and asked him how old he was & other customary questions pertaining to enlistment; he said he was twenty-one years of age and one month. After he had stated his age, he read the oath of declaration, and signed it; that is, he sat down and looked at it. He said he could read it. Was executed in triplicate. One presented to commissioner, is one of them. He signed clothing receipt roll, & was clothed as a soldier. Staid round office and went to meals with us. Next morning he asked permission to go out home, & I told him I could not give him permission to go home; would have to see the lieutenant. I did not see him from that time until the day that he surrendered himself. He was meantime reported as a deserter. Charges were filed against him for desertion. Since his return he has been kept under guard, and is now kept under guard as a prisoner.

Cross-examined:

I first saw him in the office, when he walked in there. He

35 stayed there in office about five or ten minutes. When he first came there he came up, and I judged from his appearance that he was somewhat intoxicated. He asked me if we were recruiting for regular service; told him we were. He asked me what age was required to enlist; told him twenty-one. He asked me then if a few days or months would make any difference; told him that if he lacked half a day of 21 would not enlist him. That was all.

Ques. Did you think that one of that appearance would come into the office and ask such questions, and be twenty-one?

(Objected to; taken under objection.)

Answer. Yes, sir. I would not think that because a man came into my office and said, "Sergeant, if a man is three months under twenty-one, will you enlist him?" he must be under twenty-one, for this reason —he might have a friend who wished to enlist under that age. Prisoner had no friend with him. If a person having no friend with him should ask that question I would not think he was under 21, because people frequently come in and ask the conditions of enlistment.

Question. If a man having no friend under 21 whom he is de-
36 sirous of having enlist into the service with him, and after being told that no one under 21 could enter the service, would you think it natural for him to ask the question, if four or five months under 21 would make any difference?

Ans. I think it would be quite natural. I have stated all that occurred at that time; all I recollect. He did not say to me that he wouldn't swear he was 21. He did not state to me that he was 17 years of age the 20th of last February. Had no such conversation with him. I didn't tell him it wouldn't be necessary for him to swear to his age, but only state it to the lieut.—at no time. I had no conversation that I recollect of, except what I have sworn to. Next morning had no conversation about his enlistment. Told him that lieut. would be down next morning at ten o'clock and enlist him if he wanted to enlist. Told him if he was half a day under 21 he wouldn't be taken. I issued clothing to him—cap, shirt, pants, stockings, blouse, blanket, haversack, knapsack, & canteen. I did not issue him any shoes. Have stated all I know about this. There were two or three citizens in office at time of first conversation. Won't be positive whether they went out as
37 he came in, or remained there while I was talking with him. Am sure I issued cap to him. Went up to clothing store & traded, I think--a good many did.

I. CONROE.

Sworn & subscribed before me this 12th day of August, 1869.

R. J. CHASE,
Court Commissioner Dane Co., Wis.

MARIUS BRODAHL, being duly sworn, testified as follows:

I am a private in the army, and one of permanent party here on recruiting service. Was present at time prisoner enlisted. I asked his age at time he enlisted, and he said twenty-one years and one month. There were present Lieut. Stone, sergeant, and two citizens who enlisted as recruits at same time. I was in the sleeping room, and the sergeant called me in to help lieut. fill out blank. The lieutenant filled out first blank. I copied it, and he gave me his name as Frank Brown; his age as twenty-one years and one month. I arose and showed him where to sign the papers, and told him to read it over, as it was an oath; and he sat down and appeared to be reading, and he signed the declara-

38 tion. I saw him sworn in. That was all that took place in my presence. I missed him next day at dinner; was not there. Next time I saw him he came in, on the day he surrendered himself, with the sergeant.

Cross-examined:

I came here the 7th of July, 1869, and 21 last March. I was called out of other room to help make out papers. I have been detailed as belonging to the party. I asked no questions, but simply did what told to do. I have filled out papers when lieut. was not there. Nothing peculiar in this case. There were two enlisted at same time; are now gone in service; went away before prisoner returned; the first squad after his enlistment. Lieut. made out first papers, and I copied it. I don't know what occasioned me to ask him his name or age; but I did, I am sure. Lieutenant filled out one paper, and I copied it. I asked him, because he had only stated to lieutenant his age as 21; and I asked him to find out the time when he was 21, and he answered 21 and one month.

MARIUS BRODAHL.

Sworn and subscribed before me this 12th day of August, 1869.

R. J. CHASE,
Court Com'r Dane Co., Wis.

39 HENRY L. STONE recalled:

Ques. After this man deserted, did you have any conversation with his father & brother about it, and if so, what?

Ans. They came into my office the afternoon he was absent without leave. I told them the way that could be used to get him out of service, and promised to retain the boy at the rendezvous until I could make a personal application to the adjutant general for his discharge and receive an answer, by which answer they must be content to abide. They promised the boy should return the next day, which he didn't.

Cross-examined:

Finally boy did return voluntarily.

HENRY L. STONE,
1st Lieut. U. S. A.

Subscribed & sworn to before me this 12th day of August, 1869.

R. J. CHASE,
Court Commissioner Dane Co., Wis.

The evidence in support of the return was here concluded.

The counsel for the petitioner then called as a witness the prisoner, EDWARD TARBLE alias FRANK BROWN, who being duly sworn,
40 testified as follows:

My name is Edward Tarble. I am son of Mr. Abijah Tarble, the petitioner. I am the soldier for whom this habeas corpus is issued.

Ques. State briefly, so the court can take it down, the facts of your pretended or alleged enlistment, the statements you made to the sergeant as to your age, and all other facts concerning the same.

(This question objected to. Testimony touching the validity of the enlistment taken under objection.)

Ans. July the 26th I came to town with James Paul. About half-past four or five we came up to the recruiting office. The serjeant, Conroe, was in the room. There was a citizen in the room when we came

there. I asked the serjeant if they were recruiting for the regular army. He said they were. I asked him how old they had to be. He told me they had to be 21 years old. I asked him if they would take any under 21 years of age. He told me they would not. I told him I was too young. He asked me how old I was; told him I was 17 the 20th of last February. He told me he thought I was about 19 years old. He
41 told me they wouldn't take me unless I was 21 years old. I told him that I was not 21 years old, and that I would not swear to it. He told me they wouldn't require me to swear that I was 21 years old. That was all about my enlisting. I stayed there that night. He told me that the lieutenant would be back the next day at ten o'clock. He told me, that if I didn't tell the lieutenant I was 21, he wouldn't take me. I went back next day at ten o'clock. There were two besides myself. The lieut. and Sergeant Conroe were in the office. Brodahl was in office, I believe; am not certain. The lieutenant asked me if I wanted to enlist. I told him I did. He asked me my age. I told him I was 21 the ninth or tenth of last June. He asked me my name. I told him my name was Frank Brown. He swore us in then. That is all. James Paul and another citizen was in there. Don't know whether citizen came in after or not. Paul came in with me. I was seventeen years old the 17th of last February. My father did not consent to my enlistment. I did not think of it myself when I left home in the
42 morning. Didn't think of it until half an hour before I came up to the office to enlist. The sergeant was in office at time I was sworn in; also, Brodahl, I believe, and another fellow sworn in with me, and another that I don't know his name. The sergeant told me that he guessed I could get in.

Cross-examination:

I was not pretty well intoxicated the first day I went in to see the sergeant. I drank three glasses of beer at the Cat-fish, eight or nine miles from Madison. I live in town of Vienna, some seven or eight miles from Madison, where I drank beer, when I came by there, somewhere about ten o'clock. James Paul was coming in after a reaper, & I came in with him; got to town somewhere near noon. Never in army before. After got to town, came down to Vaughan about half-past one or two, and staid there waiting for Vaughan. Don't know when Vaughan came; about two. Didn't drink after I came to town; nothing whatever. I staid with Paul all the time; think, though, I came up to mail a letter before I went to recruiting office. I did not tell Paul I
43 was going to enlist until an half hour or hour before I went to recruiting office. I told Paul after mailing letter; quite a time after; an hour or two before. Was as late as half-past four when I came up to recruiting office; told him then I was going to enlist, & wanted him to go up with me. He went up with me. That was the first time I had been to the recruiting office. When I went in the sergeant, Conroe, was there, and a man in there; don't know whether man came in while talking, or in before. Sergeant was writing behind table when I went in. Paul went in with me, side by side, or right with me. I went up and sat down on the table. Paul was setting on the back side of the table. Sergeant could see Paul; nothing to prevent. I recollect the words distinctly, mainly; could'nt tell everything said. There about 20 or 25 minutes; went then down to Vaughan. Paul started for home, and I started out with him; and I came back & stayed all night with recruits. Went out a way with Paul. Paul didn't get his reaper. When he got out, I told him I was going to enlist, and to tell my folks

of it. He tried to dissuad me from it. I did not sit out with him to go home, but to go short way with him. The first thing I asked him, sergeant, was, if they were recruiting for army; told me they were; then asked age required, and he told me 21. I did not ask him if a few months would make any difference; I asked him if they were taking under 21. He did not say anything about half a day. I told him I was not 21. I asked him how old they would have to be, and he told me 21; and I told him I was 17 the 20th of last February. I asked sergeant how old he would take me to be, and he said 18 or 19; and I told him I was 17 20th of last February. He told me lieut. would'nt take me unless I was 21. I told him I would not swear that I was 21; and he told me I would not be required to swear that I was 21 years of age. I asked him next, if he thought they would take me, and he said he thought they would. Had just told me they wouldn't take me if I was under 21 years of age. I asked him two or three times; he said he could'nt swear me in; that to be round at ten o'clock and lieut. would swear me in; told me if I told the lieut. I was under 21
45 he would'nt take me. Said I wouldn't be required to swear I was 21 years of age. He told me just what pay was; don't remember; was first time I went in; was allowed clothing to about $100. I don't remember anything else he said. I went there next day, & lieut. was sitting behind desk. Sergeant was there. Lieutenant asked me my age, & I told him 21 last February. I told him name of Frank Brown, because I did'nt want folks to find me. I misstated my age and name with view to procuring enlistment. I did it to deceive lieut. as to my age; to be sure I did, because I wanted to get into the army. I had seen that day an old friend who had enlisted. I don't know whether or not he told me that no one under 21 would be rec'd. I saw this other fellow, Frank, and he thought I had better go. I don't know that sergeant had anything more in inviting me to enlist than what I stated. I went up first time with intention of enlisting then, and would then have sworn in had the lieutenant been there. On second day, I knew that if I told lieut. I was under 21, I wouldn't be taken; at least sergeant told me I would not. I did not read over all of enlistment
46 papers; did a few lines of it. Next day after I enlisted, went away home.

EDWARD TARBLE.

Sworn & subscribed before me this 13th day of August, 1869.

R. J. CHASE,
Court Commissioner Dane Co., Wis.

JAMES PAUL, being duly sworn, says:

I live in town of Vienna. I know Abijah Tarble, and Edward Tarble, his son. Met Edward in July, 1869. I came to town with Edward Tarble. I came for a reaper. Didn't come any other time with him last month. Got to town about between two and three o'clock, won't be certain. I went down to see about getting my reaper. He went with me. Vaughan was reaper man. After awhile came up to recruiting office. He asked sergeant if they enlisted men there. He told him they were enlisting men. Sergeant asked him how old he was. He told him he was seventeen. Then the sergeant told him he thought he was older than that, and he told him he wouldn't swear that he was twenty-one. I don't know as I am positive what he said further. Think he said wouldn't enlist him any younger than 21. I heard more,
47 but don't think of all that I heard. I think Tarble told him he

was 17 such a day of the month; forget what. Don't remember anything more in particular. When Tarble told the sergeant that he was 17 years of age the sergeant said they couldn't enlist him unless he was 21 years. That is all I can think of. Of course they talked more.

Cross-examined:

Were in recruiting office not more than half an hour. Can't tell; was over five minutes. Couldn't say any length of time. Got to town between two and three o'clock. Didn't find Vaughan at first. Staid at Vaughan an hour and a half. Came in after reaper. Didn't get it. Didn't have it; got it since. When first went in Tarble asked if it was a recruiting office. Sergeant said it was. Then asked how old they took them. Said 21. Tarble said was only 17. Sergeant said didn't enlist under 21. Edward said wouldn't swear was 21. Sergeant said wouldn't take them under 21. That was all that was said about it. Don't recollect that Ed. asked if he could get in some way, nor that sergeant said could get in some way. Ed. asked something about
48 pay. Don't know what. I don't know as I can remember a single thing that sergeant said that wasn't in answer to some question. Don't remember that Ed. asked him if sergeant would enlist him. Ed. told him that he wanted to enlist, I believe, but I thought he was only fooling at the time. Don't remember of anything said about whom to enlist him. Don't know; there might have been something said about some other officer, but I didn't know who. Sergeant told him wouldn't enlist until next day. Tarble rode with me a little way; down to corner; told me he wasn't going home with me; that he was going to enlist. I coaxed him to go home. Besides myself, Tarble, and sergeant, there was another young man. Believe not a soldier. Drank some that day. Drank at Cat-fish; was not drinking in town. Tarble was away a little while.

JAMES PAUL.

Sworn & subscribed to before me this 13th day of August, 1869.

R. J. CHASE,
Court Commissioner Dane Co., Wis.

ABIJAH TARBLE, being duly sworn, says:

Live in Vienna. Am the petitioner. Edward Tarble is my son. He was 17 years of age the 20th day of last February. I did not
49 consent to his enlisting. Have never consented since his enlistment. He was living with me at time of enlistment.

Cross-examination:

He was 17 last February. I know by family record. Is a mistake of one year in record. Should be 1852 instead of 1851. Don't think I can recollect the year my son was born. This is my family Bible. Has been kept in my family as the family records. Contains record of marriages, birth, and death.

Direct ex. resumed:

My oldest boy made that record. Is dead & buried. He made it while a boy. Didn't make it under my direction. Didn't know anything about it at the time. It is not an accurate record of my family. The entry of birth of my son Edward, in 1851, is an error. My son Edward was born 20th day of February, 1852. I lived in New York State, Jefferson Co., town of Adams, when he was born. My oldest son left about last of February, may be first of March, 1852. His

mother had then been confined about two weeks with Edward. I
50 didn't know he had gone until next morning; I asked where Joy was; his mother said he had gone to Oswego. Made my wife feel bad; probably didn't get round house so soon as she would if he hadn't gone away. Have seen letter now shown me before. Was written by my son Joy. He is dead. That letter was received four or five weeks after birth of Edward. (Letter produced in evidence.) Daughter, Olive Tarble, is alive. Difference between Olive & Edward is about 3 years. Think about 20 years of age. Born in 1848. Don't remember time of year. Difference between Edward & Elisha a little over six years; am not positive. Elisha born 1846; July 5th. Mary, I can't remember when she was born. The other entry, in record of Edward Tarble, was made, I understood, by my son Edward. I don't write much myself. The entries in my family record I didn't know was made out for quite a spell until after made. My wife rec'd the letter shown same year it was written. I brought it from post office myself. I know that the letter was written same year the child was born. I remember this morning I testified I couldn't remember the year the child was born,
51 but I have thought it over since. The record show two entries by son Joy and Edward, but is not correct. I don't now remember how old Joy was when Edward was born.

ABIJAH TARBLE.

Subscribed & sworn to before me this 13th day of August, 1869.

R. J. CHASE,
Court Commissioner Dane Co., Wis.

ELISHA TARBLE, being duly sworn:

My home is Vienna, this county; am son of Abijah & brother of Edward Tarble. Have seen the family record produced here. My age was 23 the 6th day of last month.

Ques. What has been always the understanding of members of your family, of difference between your age & Edward Tarble? (Objected to; objection sustained.) The difference between sister Olive & myself is two years, to best of my knowledge. To best of my knowledge & belief, difference between Edward & myself is a little less than six years. My brother Edward is, I think, 17 years of age 20th of last February.

Cross-examination:

I have as much knowledge on this subject as I have of my own
52 age—no more. Do not recollect of doctor being there. Do not, myself, recollect period of his birth no more than what family have told me. I was at home time Edward was born. A few hours after Edward was born my mother called me to his bed-side and showed him to me. Don't recollect anything else about that time.

ELISHER H. TARBLE.

Sworn & subscribed to before me this 13th day of August, 1869.

R. J. CHASE,
Court Com'r Dane Co., Wis.

EDWARD TARBLE recalled:

I wrote another entry under head of deaths in record; some five or six years ago. I didn't know how to write, and I took & copied from my brother's handwriting as near as I could.

Cross-examined:

I then understood I was copying the year of my birth. I then understood that record was right. I have, for five or six years, understood my brother made a mistake in making up the record.

Re-direct examination:

53 At time I made record had not understood anything about whether correct or not. For five years have heard record was wrong one year.

EDWARD TARBLE.

Sworn to & subscribed before me this 13th day of August, 1869.

R. J. CHASE,
Court Com'r Dane Co., Wis.

Petitioner here closed evidence.

ISRAEL CONROE was recalled for support of return, and testified:

He did not tell me, "I am too young to enlist." He said, "I am old enough, any way."

(Objected to. Taken under objection.)

I did not say to him that I thought he was about 19 years of age. He did not tell me that he was not 21 years old, and he wouldn't swear to it. I told him on that afternoon, lieut. would be there next day. I said nothing about his age being 21. I did not tell him that *that* if he didn't tell lieut. he was twenty-one, lieut. would take him. I told him next day when I called him out of room, or saw him in hall, that
54 his ankle, which had been dislocated, would make no difference, if sound. That was only occasion that I told him thought he could get in. I might have told him that night that I thought he could enlist in morning. I never told him that I thought he could get in if under 21, or words to that effect.

I. CONROE.

Sworn & subscribed before me this 13th day of August, 1869.

R. J. CHASE,
Court Commissioner Dane Co., Wis.

The evidence here closed with the understanding that further evidence might be introduced on the point of prisoner's age. Argument commenced, W'm F. Vilas opening for custodian of prisoner, & followed by J. C. Spooner for petitioner. The further hearing was then adjourned till Aug. 14, 1869, at 10 o'clock a. m. At last-named time, prisoner being present, counsel for petitioner offered further proof of the age of prisoner as follows:

Mrs. OLIVE TARBLE, being duly sworn, testified:

I am the mother of Edward Tarble, my son, the prisoner. He was seventeen years old the 20th day of last February; was born in 1852, February 20th. This is the Bible which belongs in my family.
55 The writing in it was written by my oldest son, who wrote it of his own accord. My son took up this Bible and was looking at it, and asked me to let him put down the records. I told him no; that he couldn't do it right. He said he could, with my help. I told him I couldn't help him; I had no time; that if he did it he did it of his own accord. The record is not right. There are mistakes in it. The record shows that one child was born in 1842 and another in 1845; not so.

The record of Edward's age is wrong; is 1851 on record; should be 1852. The letter shown me was received by me as soon as it could come fifty miles; was written a month & three days after birth of Edward. I had other children living at home at that time. This daughter, Melissa, was 12 years old at that time. Is here in court.

Cross-examination:

I can tell you what transpired near time Edward was born. Railroad was built from Rome July before. I was knowing to son writing, but paid no attention. I looked for this letter to convince husband I was correct. Son Joy was born & 2nd day of Oct.; if living, would be 33 next Oct. Can't tell how old Joy was when he wrote. Daughter
56 Julia died when six weeks old. Did not consent to his enlistment. I was mistaken as to record being wrong in 1842 & 1843. These dates are correct as given in record.

OLIVE TARBLE.

Subscribed & sworn to before me this 14th day of August, 1869.

R. J. CHASE,
Court Com'r Dane Co., Wis.

MELISSA GREENMAN, being duly sworn, says:

The lady just sworn is my mother. Edward Tarble is my brother. I was at home at his birth. Was born February 20th, 1852. I was 12 years old at that time; November previous.

Cross-examination:

I fix date by recollecting that I was 12 years old.

MELISSA GREENMAN.

Subscribed & sworn to before me this 14th day of August, 1869.

R. J. CHASE,
Court Com'r Dane Co., Wis.

The testimony here closed, and argument proceeded—F. J. Lamb, esq., for petitioner, and closing with argument of W'm F. Vilas,
57 esq., for respondent. Thereupon the commissioner ordered that the *the* prisoner be continued in custody until Aug. 16, 1869, 9 o'clock a. m., when he should be produced before the commissioner, and at which time the decision would be rendered.

AUG. 16, 1869, 9 *o'clock a. m.*—Present, Lieut. H. A. Stone, with prisoner; also counsel for both sides. Whereupon the commissioner decided that the prisoner be discharged from custody. (See formal order.) He first, as preliminary to issuing same, paying the taxable costs in this proceeding & reimbursing the government for clothing had & not returned. Whereupon such costs being paid, and the receipt of Lieut. Stone, showing payment for clothing aforesaid, being filed, the commissioner made his final order, hereto attached, discharging Edward Tarble alias Frank Brown from custody.

DANE CO., *ss:*

I certify that the foregoing proceedings were had before me as therein stated; that the testimony therein was commenced to be taken Aug. 12, '69, as stated, and continued during that and the next two days; and that further proceedings were adjourned Aug. 14, 1869, until Aug. 16, 1869, for the decision of the commissioner; that the facts as stated oc-

curing during hearing of said matter occured as stated, and the
58 witnesses were each duly sworn to testify the truth, the whole truth, and nothing but the truth in said matter.

R. J. CHASE,
Court Commissioner Dane County, Wis.

Commissioner's fees, $17 45.

MADISON, WISCONSIN, *August* 16, 1869.

Received of Abijah Tarbell the sum of two dollars and forty-eight cents ($2\frac{48}{100}$) in full for clothing lost or destroyed by Frank Brown alias Edward Tarball.

HENRY L. STONE,
1st Lieut. U. S. Army, Recruiting Officer.

STATE OF WISCONSIN, *Dane County, ss:*

To Lieut. H. L. Stone, U. S. A.:

It appearing on the return of the writ of habeas corpus allowed by me that Edward Tarble alias Frank Brown is illegally imprisoned & detained by you, I do therefore command you forthwith to discharge him from your custody.

59 Given under my hand & seal this 16th day of August, 1869, A. D.

R. J. CHASE, [SEAL.]
Court Commissioner in and for the County of Dane, of this Circuit Court.

And afterwards, to wit, at the January term aforesaid, to wit, on the eleventh day of January, A. D. 1870, the following proceedings were had in this cause in said court:

IN THE MATTER OF THE PETITION OF ABIJAH Tarble for a writ of habeas corpus, &c., on certiorari to R. J. Chase, esq., court commissioner. } Certiorari.

And now at this day came G. W. Hazelton, esq., district attorney of the United States for the district of Wisconsin, & moved the court to dismiss the writ of certiorari issued herein.

Which said motion having been argued by G. W. Hazelton, esq., for the United States, and Messrs. P. L. and J. C. Spooner for said petitioner; and the court, not being now sufficiently advised of and concerning the same, took time to consider of its opinion.

60 And therefore the said G. W. Hazelton, esq., district attorney, &c., by leave of the court here had withdrew his said motion to dismiss, &c. And said cause having been argued and submitted, & the court not being now sufficiently advised of and concerning its decision herein took time to consider of its opinion.

And afterwards, to wit, at the term aforesaid, on the forty-seventh day of term, to wit, on the 2nd day of April, A. D. 1870, the opinion of the court was filed herein in the words and figures following, that is to say:

61 *Opinion of the court.*

Supreme Court.

IN THE MATTER OF THE PETITION OF ABIJAH }
Tarbel for a writ of habeas corpus. }

By PAINE, Justice:

This was a writ of habeas corpus to procure the discharge of a minor held in the custody of the recruiting officer of the United States as an enlisted soldier. On the hearing the court commissioner made an order for his discharge, and the record is brought here by certiorari.

The only question pressed upon our consideration by the district attorney of the United States was that of the jurisdiction of the State officer. With few exceptions, jurisdiction in this class of cases has been asserted and exercised by State judicial officers, and sustained by the highest State courts from the beginning of the government down to the present day. I shall not attempt any review of the numerous authorities on the subject. They are nearly all referred to in a note in 2nd Abbot's National Digest, p. 609.

Upon principle it has always seemed to me that the jurisdiction was very clear, and that it resulted necessarily from the very nature and scope of the writ of habeas corpus, and the absence of any provision in the federal Constitution in any way abridging the well settled power of the State courts over the writ, or exempting federal officers from its operation. This great writ is the ægis of personal liberty. It was established by the founders of constitutional freedom in England, and was ever upheld by them with a strong hand against all the encroachments of arbitrary power. None were so high as to be exempt from obedience to it, and none so low as not to be entitled to invoke its protection; and we must ever remember with sorrow if not shame, the contrast between our own highest court and that of England, presented in the fact that while ours was denying to one of an oppressed race, born on our soil, the poor privilege of even sewing for his rights in a federal court,
62 the Queen's bench sent abroad this writ into Canada to protect the liberty of one of that same race, who was a fugitive and a wanderer upon British soil.

The high, searching, and imperative character of the writ was well settled and understood at the time of the adoption of the Constitution of the United States. It was fully recognized by the provision that its privilege should be suspended only when, in cases of rebellion or invasion, the public safety might require it. The full power and jurisdiction to issue it was at that time a part of the undoubted sovereignty of the States; and as the Constitution did not in any manner abridge that power, nor exempt federal officers from its operation, by all the settled principles of constitutional construction the jurisdiction still remains.

Acting upon this theory, it has been asserted and exercised by most of the State tribunals, with little serious question, until the decision by the Supreme Court of the United States of the celebrated case of Ableman vs. Booth, 21 How., 506. Although that case related to the discharge by a State court of a party in custody under the final sentence of the district court of the United States, since its decision, some courts have applied its general reasoning to cases where the party was detained by the mere ministerial officers of the federal government under color of authority, as in the Spangler case, 11 Mich., 298. Others have asserted that there was a distinction between cases of detention under the judgment of a judicial tribunal and those of detention by mere ministerial

officers, and have refused to apply the doctrine of the Ableman vs. Booth case to the latter class. Such was the decision of Chief Justice Dillon, of Iowa, in the case of Anderson, 16 Iowa, 595. There is some plausibility in this distinction, and it has been often suggested, as will be seen by referring to the cases.

But my own opinion is that there is no solid distinction between the two classes, and that the doctrine of Ableman vs. Booth, if true
63 at all, is as applicable to one as the other. Of course, in saying this, I include in those cases of custody under judicial sentence only those where the court pronouncing the sentence has no jurisdiction. For in no other has any right to interfere ever been asserted; and notwithstanding the many general remarks to the contrary, in the opinion of the Supreme Court of the United States, this court, in the Booth case, never claimed any authority whatever to "revise," annul, or set aside the judgment or proceedings of the federal court or officers. It was never guilty of the absurdity of claiming "paramount jurisdiction in the State courts over the courts of the United States." It was much easier to impute to it such a false position, and then answer that, than it would have been to have answered the reasoning upon which it really rested its decision. It proceeded upon a very familiar principle, and one uniformly acted on by all courts; that is, that whenever in any court, in a case in which it has jurisdiction, the validity of the judgment of any other court is drawn collaterally in question, it must decide whether the court rendering it has jurisdiction. This familiar doctrine has never been more strongly asserted or acted on than by the Supreme Court of the United States. In Williamson vs. Berry, 8 How., 540, that court said: "But it is an equally well settled rule in jurisprudence that the jurisdiction of any court exercising authority over a subject may be enquired into in every other court, when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of States."

The result at which the court arrived in that case in exercising
64 this undoubted right was extraordinary indeed. It treated as a nullity, for want of jurisdiction, an order of the chancellor of New York, made under a law of that State relating to a matter wholly subject to State authority, and against the decision of the highest court of New York sustaining his jurisdiction. But it is obvious that no error in the result of the enquiry as to jurisdiction has any tendency to impeach the right to make that inquiry. That right exists from necessity, and without its daily exercise by all courts litigation could not be decided.

It imparts no assumption of authority by the court making the decision over the court the validity of whose judgment is passed upon. It imparts no power to "revise, annul, or set aside its judgments." The enquiry relates solely to the question of jurisdiction. If that existed, then the judgment, no matter how otherwise erroneous, is to have its full force and effect. The court, where it is drawn collaterally in question, can go no farther. But if that did not exist, then there is nothing to "revise, annul, or set aside." The judgment was then a nullity from the beginning. No doctrine in law is better settled than this. In truth the decisions are uniform on the subject. In the case last cited the opinion refers to the decisions of that court upon this point, and quotes from its opinion in Elliott vs. Perisol, 1 Peters, 540, as follows: "Where

a court has jurisdiction it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers."

65 That court suggests in the Booth case that this court could no more enquire into the legality of the imprisonment of a citizen of this State within its borders, under the order of a federal court, than it could send its writ into Michigan and enquire as to the legality of the imprisonment of a person there. It may be conceded that the State and federal judicial systems are as distinct and separate and independent of each other as those of different States. Such a concession is clearly contrary to the existence of that appellate jurisdiction over the State courts which the federal court has asserted and exercised. But the repugnance between the doctrine of the Booth case now under consideration and the existence of that appellate jurisdiction will be hereafter noticed. I allude now to that illustration of the court, simply to say, that if the validity of a judgment of the court of Michigan should be drawn in question in any court of this State, in the exercise of its ordinary jurisdiction, the court here could decide, and must necessarily decide, whether the court of Michigan had jurisdiction to render it. The fact that the two jurisdictions are utterly foreign to each other does not prevent either from deciding to that extent upon the validity of the judgments and proceedings of the other. Here, too, the federal authority is clear and emphatic. In the case of Rose vs. Kimely, 4 Cranch, 241. the court sustained the right of an American court to decide collaterally upon the jurisdiction of a court of Santo Domingo. The Chief Justice said, "The great question to be decided is, was this sentence pronounced by a court of competent jurisdiction? At the threshold of this interesting inquiry a difficulty presents itself which is of no inconsiderable magnitude. It is this, can this court examine the jurisdiction of a foreign tribunal?" The latter question he answered in the affirmative, and in discussing it he said: "A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it

66 had decided, could have no legal effect whatever. The power of the court, then, is of necessity examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into, and its authority to decide questions, which it professed to decide, must be considered." And again he says: "Upon principle it would seem that the operation of every judgment must depend upon the power of the court to render that judgment, or, in other words, on its jurisdiction over the subject-matter which it has determined."

Although all this doctrine is, as before remarked, entirely familiar, I have felt justified in thus quoting it from the Supreme Court of the United States, in order to show that when this court, in the Booth case, assumed the power, in the exercise of its ordinary jurisdiction, to issue the writ of habeas corpus, to pass collaterally upon the jurisdiction of the district court of the United States, to pronounce the judgment under which Booth was imprisoned, it was not assuming any such unwarrantable or unheard-of power as it has been charged with doing; and that, on the contrary, whatever might be said as to the correctness of

its decision, still, in exercising the right to decide the question, it was proceeding upon a principle universally recognized, and exercising a right that is and must, of necessity, be exercised by all courts; for there is no just reasoning upon which any distinction can be asserted between a habeas corpus and any other judicial proceeding or suit, in respect to the right of the court to decide upon the validity of the judgment of any other court that may be drawn in question. It is true that, as States have no extra-territorial jurisdiction, and each can, therefore, by the writ of habeas corpus, enquire into the legality of imprisonment only within its own limits, such a proceeding would be less likely to draw in question the validity of any foreign judgment than would litigation concerning rights of property. But this can make no possible differ-
67 ence in respect to the right of the court to decide the question, if it should arise; and although such a case may be very unlikely to arise, yet, if any one should assert a right to imprison any person within this State under the judgment or order of a court of Michigan, or of any other State or country, it would scarcely be claimed that the entire separation of the two sovereignties and the absence of any power to review the judgments of such other court would prevent this court from inquiring upon habeas corpus into the legality of such imprisonment.

But under our peculiar system, where the State and federal government, with their distinct judicial systems, exercise a divided sovereignty and jurisdiction over the same territory and people, such a question may well arise, as it did in the Booth case; and for this court, in that case, in the exercise of its acknowledged jurisdiction of the writ of habeas corpus, when the judgment of the district court was returned as the justification for Booth's imprisonment, to pass upon the question whether that court had jurisdiction to pronounce such judgment, was no more a usurpation of authority than it would have been to have passed upon a judgment of a court of Michigan, or any other State, if such had been set up in justification. The fact that a district court might render a valid judgment that would justify imprisonment in this State, and that no court of another State could do so, does not vary the question. That fact gives no validity to its judgment rendered without jurisdiction, and has no legitimate tendency to impeach the right of the State court to pass upon this question; and there is nothing in the relations between the federal and State governments, nothing in the conceded supremacy of the Constitution and laws of the United States, nothing in the nature or character of the federal courts themselves, which can have any just effect to make their judgments an exception to that universal rule which, as already seen, they have so emphatically asserted, or to place them on any different footing, in this respect, from that on which the judgments of other courts must stand.

68 In a suit in a State court involving a right of property title is claimed through a sale under a judgment of a federal court. The State court, in deciding on the effect of the sale, must necessarily pass on the jurisdiction of the court by which the judgment was rendered. This court, in a civil suit, recently passed on the jurisdiction of the federal court to render a decree for the sale of a railroad on the foreclosure of a mortgage. There was no suggestion from any quarter that in doing so it was exercising any unwarrantable or unusual power, or assuming any authority to control, revise, or annul the judgments of that court. Nor was it. As already said, it is a power constantly exercised by all courts. But it is precisely the same power that is exercised in a proceeding by habeas corpus when the validity of a judgment under which the

party is imprisoned is drawn in question. A judgment in a civil suit disposes of the title to property. A judgment in a criminal suit disposes of the prisoner's right to liberty. A civil suit involving the title to that property is the appropriate proceeding in which the jurisdiction of the court to render the one judgment may be drawn in question collaterally. A proceeding by habeas corpus may appropriately have the same effect as to the other. But the right of the State court to decide on the validity of the judgment in the latter case is as clear as its right in the former. It rests upon the same principles and stands or falls by the same reasoning.

This court, in the Booth case, held the fugitive slave law, under which he was convicted, unconstitutional and void, and that therefore the jurisdiction of the district court over the subject-matter of the indictment failed. Whether it was right or wrong in this conclusion, or in subsequently denying the appellate jurisdiction of the Supreme Court of the United States, is immaterial, so far as the question under discussion is concerned. Both of those questions are entirely distinct from that of the right of the court to pass collaterally on the jurisdiction of the federal court in the first instance. The latter is all that is now under
69 consideration; and, in discussing that, I have the right to assume that this court may have been right in holding that the district court had no jurisdiction. The question is to be tested upon the assumption that federal courts may render judgments void for want of jurisdiction, and that federal officers may imprison persons without lawful authority; and the vital question is whether, in such cases, the State tribunals are utterly powerless to relieve.

It is not my design to enter into any general vindication of the positions taken by this court in that case. I have considered it only so far as was material to the questions now presented. And I have said what I have concerning the nature and effect of a judgment void for want of jurisdiction and the right of every court to treat it as a nullity, when drawn collaterally in question, for the purpose of showing that there is no substantial distinction between the case of an imprisonment under such a judgment and one of any other illegal imprisonment under pretence of authority from the United States, in respect to the right of the State court to enquire, in the first instance of habeas corpus, into its legality. There cannot well be any authority less than that afforded by a "nullity." There cannot well be any pretext of authority entitled to less consideration than that which, in the language of Chief Justice Marshall, "has no legal effect whatever." If, therefore, the State court has the right in any case to go beyond the mere enquiry whether any authority is claimed under the United States, if it has the right to require the return to a habeas corpus, to show a legal authority for the imprisonment, and not a mere claim of it, such right must extend to both of the classes of imprisonment that have been referred to. Still, in the opinion of the Supreme Court of the United States, there was so much stress placed upon the fact that the imprisonment was under a judgment of the federal court, without seeming to take any notice of the real ground upon which this court proceeded, or of the broad distinction between the right to review or set aside a judgment and the right to enquire collaterally into the single fact of jurisdiction, that there is room for refusing to apply its general reasoning in that case to a case like the present, where the detention is by a mere military officer, without the
70 judgment of any court. But upon principle there is no distinction, and the jurisdiction of the State court extends to both. If there were no appellate jurisdiction the argument of convenience in favor of

the position that all questions as to the legality of imprisonment under alleged federal authority should be decided exclusively by federal tribunals, would be very strong. It would doubtless then have been held that the judicial power of the United States over all cases "arising under the Constitution and laws," was exclusive; but that appellate jurisdiction over the State courts exists. It was provided for by an act of Congress at the very outset of the government. It has been steadily asserted and exercised by the federal court, and though denied in a few instances by the State courts, may now be said to be universally acquiesed in. This being so, the argument of convenience, against the right of the State court to decide in the first instance any question under the laws of the United States arising incidentally in a proceeding by habeas corpus, as well as in any other judicial proceeding, loses all its force. And the denial of that right is utterly repugnant to the entire theory upon which this appellate jurisdiction is sustained.

That theory is that the grant to the judicial power of the United States of cognizance of all cases at law or equity arising under the Constitution and laws of the United States was not exclusive, and that neither this nor any other provision of the Constitution deprived the State courts of the power to decide all such questions whenever they should incidentally arise in the exercise of any jurisdiction which they then possessed. It will even be found, by referring to the proceedings of the conventions which framed and ratified the Constitution, that the idea was very prevalent among its friends that Congress would leave the State courts to exercise all the subordinate federal jurisdiction, and not establish any inferior tribunals whatever. In the convention which framed it, after a resolution had been first adopted in such form as to make the establishment of inferior tribunals imperative upon Congress,

it was deliberately stricken out for the avowed purpose of allow-
71 ing the State tribunals to decide all such questions in the first instance. And the friends of the establishment of inferior tribunals afterward procured the adoption of the clause "that the national legislature be empowered to institute inferior tribunals," observing that there was "a distinction between establishing such tribunals absolutely and giving a discretion to the legislature to establish or not establish them." (Madison Papers, 798, 799.) And though the language of the provision, as finally adopted, was somewhat different, it was evidently supposed that it vested in Congress merely that discretionary power, and still left it at liberty, if it saw fit, to leave the State tribunals to exercise in the first instance jurisdiction in all the cases which might otherwise be committed to the inferior federal courts. I know the Supreme Court has held that Congress could vest no part of the judicial power of the United States in State courts. But such was clearly not the idea of the framers of the Constitution, as seen by the proceeding already referred to, and by the fact that in the State conventions its friends defended it upon the assumption that it gave Congress only such discretionary power, and that Congress would, in all probability, in the exercise of that discretion, leave the subordinate jurisdiction wholly to the State courts. And where it was assumed that Congress might establish inferior tribunals, the friends of the instrument nowhere claimed that this jurisdiction would be exclusive, but admitted that it would be concurrent only with that of the State courts so far as any question under the Constitution and laws of the United States might be raised before the latter in the exercise of any jurisdiction they then possessed. Chief Justice Marshall, who was a member of the Virginia convention, said: "The State courts will not lose the jurisdiction of the

causes they now decide. They have a concurrence of jurisdiction with the federal courts in those cases in which the latter have cognizance." But it is idle to multiply evidences that such was the view then held. The existence of this concurrent jurisdiction is plainly contemplated by the Constitution itself, fully recognized by Congress in the judiciary act providing for an appeal from the State courts, and admitted by the
72 Supreme Court of the United States as the basis of its reasoning in support of such appellate power. The Constitution carefully provided that the judges of the State courts should be bound by the Constitution and laws of the United States. Why was this if they were never to decide at all upon questions arising under them? The judiciary act provided that whenever the highest State court decided against "the validity of any treaty or statute, or of any authority exercised under the United States," for a review of such decision by the Supreme Court of the United States upon writ of error. Thus expressly assuming that the State courts may decide in the first instance upon the validity of any statute, or treaty, or authority claimed under the United States. In Martin vs. Hunter's Lessee, 1 Wheat. 342, the Supreme Court, in sustaining this appellate jurisdiction, say: "It must therefore be conceded that the Constitution not only contemplated but meant to provide for cases within the scope of the judicial power of the United States which might yet depend before State tribunals. It was foreseen that in the exercise of their ordinary jurisdiction State courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction, if that was already rightfully and exclusively attached in the State courts, which (as has been already shown) may occur. It must therefore extend by appellate jurisdiction or not at all."

It appearing, then, that the framers of the Constitution, the conventions that ratified it, the Congress, and Supreme Court of the United States, have all united in asserting the existence of this concurrent jurisdiction, it having been exercised by the State courts as well in habeas corpus as in other judicial proceedings, from the formation of the government down to the decision of the Booth case, how
73 could it be said that this court, when in that case it exercised the power of deciding on the validity of an act of Congress, was taking any unusual step or guilty of any extraordinary usurpation? Certainly there was no just foundation for such a charge.

That which was really unusual and extraordinary was not that it assumed the power to decide upon the question, but that in exercising that power it decided against the validity of a law passed to sustain the institution of slavery. The public and judicial mind of the country was then in such a peculiar state upon that question, that it was doubtless this fact, together with the subsequent denial by this court of the appellate jurisdiction—which was, in truth, contrary to the entire current of authority—that so shocked the nerves of the venerable members of the Supreme Court that they failed to perceive distinctly the real theory upon which this court had assumed the right to pass collatterally upon the validity of a judgment even of a federal court. Their opinion is certainly liable to the criticism that almost throughout it confounds the distinction between an actual federal authority and a mere claim of it, and the distinction between the right of a court to pass collaterally on the question of jurisdiction in the proceedings of any other court, and its right to review and set aside such proceedings where jurisdiction was conceded. It assumed that this court claimed the latter power, and the

power to discharge any prisoner held under an actual federal authority. And it gravely quoted our statute expressly requiring our courts to remand the petitioner for a habeas corpus whenever it appeared that he was held by process from a federal court in a case in which such court "had exclusive jurisdiction," as being repugnant to the theory on which this court had professed to proceed.

This mode of treating the subject certainly justified the remark of Attorney General Stanberry, in his official opinion in 1867, in answer to an inquiry from the Secretary of the Navy. When speaking of this decision, he said: "The language used in this opinion is not quite so specific as might have been expected." And it is worthy of remark that the learned Attorney General not only fully sustained the juris-
74 diction of State tribunals, in cases where the detention is by a mere ministerial officer without judicial process, but that he seemed to confine the application of that decision to cases not only where the imprisonment is under process, but under valid process. He says: "Nor can I understand the language of the court, in Alleman vs. Booth, in reference to the exclusive jurisdiction of the United States as applicable to any other jurisdiction over persons restrained of their liberty than that which depends upon jurisdiction acquired under process of the courts of the United States." It has never been claimed by any one that the State courts had any right to discharge a person legally held in custody under the authority of the United States, either with or without process. But even that admission does not impeach their jurisdiction to enquire by habeas corpus whether he is so held. It only shows that where such fact appears it is their duty to remand the prisoner.

True, if the jurisdiction exists, they might decide erroneously as to legality of the custody. What of that? The only result would be that the very event contemplated and provided for by the judiciary act would have taken place. They would have decided erroneously "against the validity of an authority exercised under the United States." That this might happen, the Supreme Court tells us was foreseen. Even that part of its opinion in the Booth case, which reasons in favor of its appellate jurisdiction, fully shows this, and cannot be reconciled with its intimations that the State court had no right to decide upon the question at all. Speaking of the supremacy of the Constitution and the laws passed in pursuance of it, the court says: "The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State and the courts of the United States might, and indeed certainly would, often differ as to the extent of the powers conferred by the general government, it was manifest that serious controversies would arise between the authorities of the United
75 States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal."

How could these controversies arise, how could the State and federal courts differ upon these questions, if the State courts were never to decide them at all? And there is no reasoning upon which their jurisdiction in habeas corpus proceedings can be distinguished in this respect from any other part of their jurisdiction. If it be said that the power might embarrass the military operations of the government, it may be answered in the first place that the exigencies of military necessity may justify an officer in temporarily disregarding a writ of habeas corpus,

whether issued by a State or federal court, as was fully recognized by all the judges of this court in the Kemp case, 16 Wis., 359.

In the next place, it may be answered that with the power to correct their errors by appeal, there can be no more serious objection to the existence of this jurisdiction in the State courts than in the inferior federal courts. The appellate jurisdiction makes them to that extent parts of one judicial system. And the facilities for the protection of liberty cannot be too great. It may be further answered that the jurisdiction has been exercised by the State courts from the beginning of the government without any serious detriment to the federal authority. And, lastly, it may be answered that even if any inconveniences could be shown to result from it, courts are not authorized upon such grounds to assume the functions of constitution makers, and import into the Constitution new prohibitions upon the States.

A prohibition upon this jurisdiction cannot be sustained upon any such principle as that upon which the means by which the federal government is carried on are held exempt from the operation of the taxing power of the States. There the taxing power, if applicable at all, was applicable to that which was the rightful means of executing the federal powers. It was held inapplicable upon the ground that from its nature it was unlimited and uncontrollable, and, therefore, if applicable, might be carried to the extent of entire destruction of the means
76 of carrying on the government. But here the question is not one of disregarding or burdening any rightful authority of the United States. It is a question more of deciding in the first instance, in the exercise of the ordinary jurisdiction of the State tribunals to protect the liberty of the citizen, whether any person claiming to hold him under federal authority has shown a valid authority. And this, instead of being a discretionary uncontrollable power, vested in officers sworn to support the Constitution of the United States, and whose decisions may be reviewed by the federal court. This so clearly distinguishes the two questions that there cannot be held to be any just analogy between them. There is nothing in the exercise of this jurisdiction by the State courts that at all impeaches the supremacy of the Constitution and laws of the United States or derogates from the authority or dignity of federal officers. On the contrary, where two governments exercise a decided sovereignty over the same territory, there is a necessity arising from the nature of the case that the officers of either must, when called upon by a tribunal that has a right to enquire into the legality of imprisonment within that territory, shew their authority. This necessity is expressly recognized by the Supreme Court of the United States in the Booth case. On page 523 they say: "The court or judge has a right to enquire in this mode of proceeding for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty." And again: "This right to *to* enquire by process of habeas corpus, and the duty of the officer to make a return, grows necessarily out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action prescribed by the Constitution of the United States, independent of the other. But after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further."

77 The fair interpretation of this language would require a legal authority to be shown; for unless there is a legal authority there is none at all. There is surely a distinction between an "authority un-

der the United States" and a mere claim of such authority. And if the court, having this distinction in view, meant that the officer must obey the writ and show a legal authority for the detention, then there is no ground for controversy.

It is true they afterwards said that if the party was wrongfully imprisoned the federal tribunals alone could afford him redress. But even that remark could have full effect by confining its application to a case of imprisonment under a judgment of a court having jurisdiction as the court held that to be. In such a case, although the imprisonment might be wrongful, on account of errors in the judgment, yet the State courts, having no power of review, could afford no relief.

But if the court meant to say that a mere claim of authority under the United States was to have all the effect of an actual authority; if it meant to say that a marshal having the custody of a prisoner under a judgment void for want of jurisdiction, which that court itself has told us was a nullity, "and that all who were engaged in executing it were trespassers," might still properly resist the State authorities by force of arms to maintain such custody, the Attorney General of the United States did well not to extend that doctrine beyond the very facts to which the court applied it. That would seem to be to lose sight of the very remedy which that court tells us the Constitution provided for differences of opinion between the State and federal courts, and to fall back upon the mode of settling such differences, which they say the Constitution designed to guard against.

To substitute for the inquiry upon habeas corpus whether there is a lawful authority for the imprisonment, the one whether there is a mere claim of it, whether the party holding the prisoner thinks he has a right, is incommensurate with the high character and function of the
78 writ itself, and with a due respect to the sovereign power of the State, to relieve against any imprisonment of its citizen within its borders which is without authority of law. And we have the concurrent testimony of those who framed and those who adopted it, of Congress, of the State courts, and of the Supreme Court of the United States, prior at least to the Booth case, that the Constitution contemplated that the State courts should exercise this power, and that any possible evils that might be apprehended from it were guarded against, not by withdrawing the power, but by providing for a review of their judgments by the federal court. It appeared from the evidence in this case that the minor was under eighteen years of age. His enlistment was therefore unauthorized by any act of Congress. It was suggested that the law makes the oath of the recruit conclusive as to his age. But it appears that the only oath taken by this recruit was the ordinary enlistment oath, which contains no statement as to age. We do not understand that the law intended to make this oath conclusive as to a matter not mentioned in it. But it is also usual, as was done in this case, for the recruit to sign a separate statement which does show his age. And the law must have intended that he should be concluded, if at all, only by swearing to that. It appears that charges for desertion had been forwarded by the recruiting officer, but it does not appear that any court-martial had been ordered, so that no question arises in respect to taking a prisoner from the custody of such a court.

I think the State officer had jurisdiction, and that his order should be affirmed.

DIXON, C. J., dissents, holding that jurisdiction of the writ of habeas corpus in cases of this nature is vested exclusively in the courts of the United States, and that the State courts cannot entertain the same.

79 Upon the filing of which said opinion the following order and judgment was entered in this cause, that is to say:

IN THE MATTER OF THE PETITION OF ABIJAH Tarble for a writ of habeas corpus, &c., on certiorari to R. J. Chase, court commissioner. } Certiorari.

This cause came on to be heard on certiorari to R. J. Chase, esq., court commissioner, and the transcript of the record in return thereto, and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the order of R. J. Chase, esq., court commissioner of the circuit court in and for the county of Dane and State of Wisconsin, made on the 16th day of August, A. D. 1869, for the discharge of Edward Tarble, alias Frank Brown, from the custody of Lieutenant H. L. Stone, U. S. A., be, and the same is hereby, affirmed.

80 STATE OF WISCONSIN, *Supreme Court:*

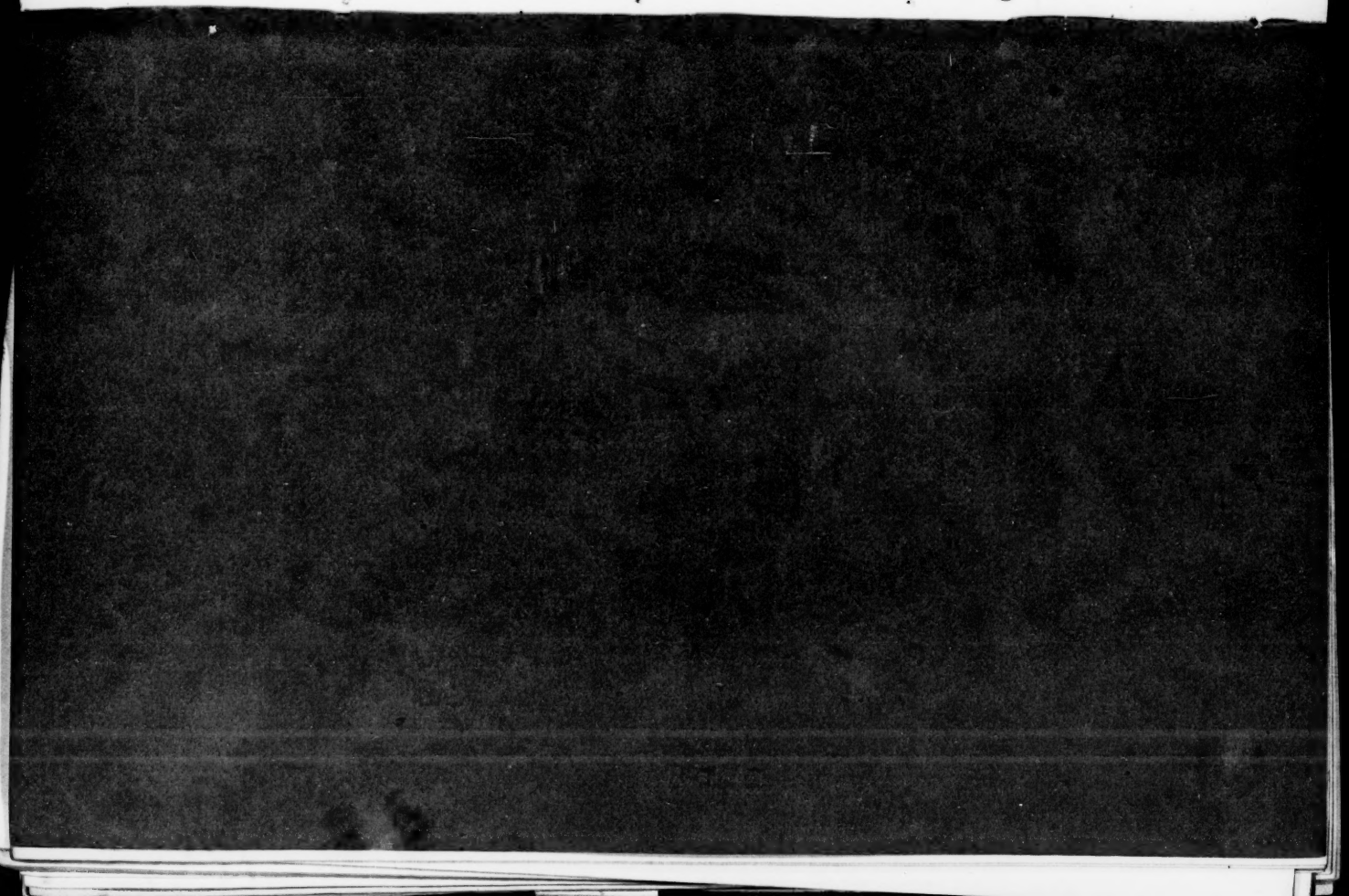
I, La Fayette Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record & proceedings in re Abijah Tarble, now of record & on file in my office in the above-entitled cause, and that it is a correct transcript therefrom.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Madison, the 28th day of April, A. D. 1870.

[SEAL.] LA FAYETTE KELLOGG,
Clerk of Supreme Court of Wisconsin.

(Indorsement:) State of Wisconsin. Supreme Court. In the matter of the petition of Abijah Tarble for a writ of habeas corpus, &c., on certiorari to R. J. Chase, court commissioner. Certified copy of record and proceedings. Fee for this copy, $21 25.

(Indorsement on cover:) No. 467. The United States, plaintiffs in error, vs. Abijah Tarble. Wisconsin sup. court.
Filed 19th July, 1870.



In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, *Plaintiff in Error*,
vs.
ABIJAH TARBLE. } No. 235.

In error to the Supreme Court of the State of Wisconsin.

This case is brought here for review under the 25th section of the Judiciary act of 1789, and the 2d section of February 5, 1867, (14 Stats., 386.) The facts of the case are as follows:

On the 10th of August, 1869, Abijah Tarble filed his petition before R. J. Chase, court commissioner for Dane county, in the State of Wisconsin, setting forth that his son, Edward Tarble, *alias* Frank Brown, was imprisoned and restrained of his liberty by Lieut. H. A. Stone, U. S. A., in the city of Madison, in said county and State, and further showing that the cause of the aforesaid confinement or restraint was that the said Edward Tarble, *alias* Frank Brown, was, on or about the 20th of July, 1869, enlisted and mustered into the military service of the United States; that he was under the age of eighteen years at the time of such enlist-

ment; that the same occurred without the knowledge, consent, or approval of the petitioner, and against his will; that the petitioner is lawfully entitled to the custody, care, and services of the said Edward Tarble, *alias* Frank Brown. Wherefore, petitioner prays for a writ of *habeas corpus*, to the end that his son may be discharged from custody, (Pr. Rec., pp. 8, 9.) Thereupon, the said R. J. Chase, commissioner, issued his writ of *habeas corpus*, addressed to Lieut. H. A. Stone, U. S. A., and commanding him to have the body of Edward Tarble, *alias* Frank Brown, together with the time and cause of his imprisonment and detention, before the said commissioner, at his office in the city of Madison, immediately after the receipt of the writ, (Pr. Rec., p. 9.) To this writ Lieut. Stone made return, in writing, protesting that the said commissioner had no jurisdiction in the premises, and further stating, as the authority and true cause for the detention of the prisoner, that he had regularly enlisted as a soldier in the army of the United States for the period of five years, on the 27th day of July, 1869, under the name of Frank Brown; that he duly took the oath in such case required by law and regulations; that, in said oath, he swore and declared that he was of the age of twenty-one years; and that he was on said day duly mustered into the service of the United States; that subsequently the said Brown deserted the said service, and having been retaken, was then in custody and confinement as a prisoner, under charges of desertion, awaiting trial by the proper military authorities. (Pr. Rec., pp. 9, 10.)

To this return, the petitioner, the father of the prisoner, filed a reply, in writing, alleging, on information and belief, that the prisoner was never duly or lawfully enlisted or mustered in as a soldier in the Army of the United States, or that he swore or declared on oath that he was of the age of twerty-one years, but, on the contrary, asserting that, on the 27th of July, 1869, he was under the age of eighteen years, and was only seventeen years old on the 20th of February, 1869: and, on information and belief, that he was enticed into said pretended enlistment, which was without the knowledge, consent, or approval of the petitioner; that the only oath taken by the prisoner at the time of his alleged enlistment was an oath of allegiance; that he is advised and believes that the said Edward is not, and never has been, a deserter from the said military service, or liable in any way as such: that he was absent in the State of Iowa after the 27th of July, 1869, but voluntarily returned August 9, 1869; and further, that the petitioner had no knowledge as to the prisoner's being under charges of desertion or in imprisonment, other than that contained in said return. (Pr. Record, p. 10.)

On the 12th of August, 1869, the commissioner proceeded to hear the testimony of witnesses on the issues thus formed, and, although the Record presents no bill of exceptions, the testimony appears to be spread in full upon the Record from page 11 to page 20, inclusive.

On the 16th of August the commissioner made an order adjudging that the prisoner was illegally imprisoned and detained by Lieutenant Stone, and commanding him forthwith to discharge him from custody. (Pr. Record, p. 21.) It appears, however, that before this final order was made the commissioner had required that the prisoner should pay the taxable cost of the proceeding, and reimburse the Government for clothing had and not returned. (Pr. Record, p. 20.)

On the 11th of September, 1869, Lieutenant Stone filed, in the supreme court of the State of Wisconsin, his petition, substantially setting forth the facts hereinbefore cited, (Pr. Record, pp. 2, 3, and 4,) and thereupon moved the court for a *certiorari*, directed to R. J. Chase, court commissioner for Dane county (Pr. Record, p. 4.) This motion was granted by the court, and a writ of *certiorari* ordered to be issued. The order, writ, and return thereto appear on pages 4, 5, and 6 of the printed Record.

On the 11th of January, 1870, the district attorney of the United States for the district of Wisconsin appeared in the Supreme Court of that State, and moved the court to dismiss the writ of *certiorari* issued in this cause, but on the same day withdrew the motion by leave of the court, whereupon the cause was argued and submitted to the court. (Pr. Record, p. 21.) But afterwards, to wit, on the 2d day of April, 1870, the supreme court of Wisconsin ordered and adjudged that the order of the commissioner discharging the prisoner be affirmed. (Pr. Record, p. 32.)

The revised statutes of Wisconsin, (Chapter CLVIII. p. 904,) authorize a court commissioner to issue the writ of *habeas corpus*, upon petition of the party whose relief is intended, or of some person in his behalf.

It is insisted, on behalf of the United States, that the supreme court of the State of Wisconsin erred in the affirmance of the order of the court commissioner—

1st. Because upon the facts disclosed in the petition of Abijah Tarble, neither the said commissioner, nor any other judicial officer of the State, had authority to issue the writ of *habeas corpus*.

2d. Because the return made to the writ of Lieutenant Stone, an officer of the United States Army, having apprised the said commissioner that the prisoner was in his custody under autuority of the United States, the aid commissioner had no jurisdiction to proceed further under the writ.

3d. Because, upon the evidence heard by the commissioner, it appeared that the prisoner was regularly and properly in the custody of a commissioned officer of the Army of the United States as an enlisted soldier, duly mustered into the military service of the United States, and under charges of desertion, awaiting trial by the proper military authorities.

Whatever doubt or difficulty may have existed with reference to the question presented in this record would seem to have been removed by the unanimous opinion of this court in the cases of Ableman *vs.* Booth and United States *vs.* Booth, 21 How., 506. The want of jurisdiction and authority in a State court or judge to discharge on *habeas corpus* a person imprisoned or in custody under the authority of the United States, could not have been more clearly or strongly stated than in the vigorous language employed by this court in that case, and, although the precise question before the court related only to a party imprisoned under judicial process of the United States, yet the reasoning of the Chief Justice, in delivering the opinion of the court, is such as to admit of no serious doubt that the court intended to give the principle the broadest application. While it is conceded that a State court or judge has a right to inquire by *habeas corpus* for what cause and by what authority a prisoner is confined within the territorial limits of the State sovereignty, it is expressly held that the jurisdiction and authority of such court or judge ceases whenever he is "judicially informed that the party is in custody under the authority of the United States."

The Chief Justice adds: "If he is wrongly imprisoned," (under authority of the United States,) "*their* judicial tribunals can release him, and afford him redress."

It has been attempted to confine the operation of

that opinion to cases of parties held under judicial process of the United States, but it is difficult, if not impossible, to limit the principle announced by this court to such cases. The maintenance of the just authority and supremacy of the United States in the matter of persons held to military service is of no less consequence and importance to the Government than the independence of its judiciary. The United States having power "to raise and support armies," and "to provide for the government and regulation of the land and naval forces," and "to declare war," cannot, with safety, submit to the assumption of jurisdiction by the judicial officers of a State to discharge soldiers from the military service for any supposed irregularity in their enlistment. If a State judge may discharge for one cause, or may discharge one man, it follows that the same power may discharge upon *habeas corpus* the whole military force of the United States.

Nor did this court mean that the State judge or court can proceed no further only when it is proved that the party is in custody under the *lawful* authority of the United States. If such be the meaning of the court, the able and elaborate argument of the Chief Justice is without force, and wholly unnecessary, for it is undeniable that, when it is made to appear in return to a writ of *habeas corpus* that the party is in custody under the *lawful* authority of the United States, a Federal judge can no more discharge him than a judge of a State. It would seem to result necessarily that when

the State judge by whom the writ was issued is judicially apprised that the prisoner is held in custody by an *officer* of the United States, under what purports to be the authority of the United States, the judge can proceed no further. In such a case he would have no right to inquire either into the validity or regularity of the enlistment of a soldier, or into the jurisdiction of a judicial officer of the United States to issue the writ under which the prisoner was held. When he is "judicially informed" that the prisoner is held in custody by a commissioned officer of the Army of the United States as an enlisted soldier, or under process issued by one of the judges of the United States, he then knows "that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the exclusive jurisdiction of the United States."

If a party be wrongfully imprisoned under authority of the United States, the courts of the United States and their judges alone may discharge him. This results from our complex system of Government; and the maintenance of this principle is essential to the very existence of the national sovereignty. The supreme court of Wisconsin, in the opinion accompanying their judgment in this case, and reported in 25 Wisconsin, p. 391, concedes that there is no solid distinction between the cases of detention, under the judgment of a

judicial tribunal, and those of detention by mere ministerial officers, and that if the principle announced by this court, in Ableman *vs.* Booth, be true at all, it is applicable as well to the one as to the other. The judgment of that court was reached by denying altogether the correctness of the opinion of this court.

If it be conceded that a State court would have authority to press the inquiry to the point of ascertaining whether or not the claim of authority under which the prisoner is held is asserted *in good faith*, and that color of authority actually exists, it nevertheless remains that the Wisconsin court in this case has passed beyond the boundary of its jurisdiction, for there is nothing in the record to raise the slightest question as to the good faith of the officer, and color of authority fully appears.

The principle of Booth's case has been expressly held to be applicable to the case of an enlisted soldier in the army of the United States, in the following cases:

In re, Spangler, 11 Mich., 299.

State *vs.* Zulich, 5 Dutch., 409.

In re, Hopson, 40 Barb., 43.

In re, Jordan, 11 Am. Law Reg., 749.

In re, Farrand, 1 Abbott's U. S. Rep., 141. (Opinion of Ballard, Dist. Judge.)

See, also, charge of Mr. Justice Nelson, 1 Blatchford's, C. C., Rep., 642, 643.

In re, Husted, 1 Johns. Cases, 136.

In re, Ferguson, 9 Johns., 239.

But it further appeared, by the return of the officer, as also in the testimony heard by the court commissioner, that the relator was in custody and confinement "as a prisoner, under charges of desertion, awaiting trial by the proper military authorities."

The offence with which the prisoner stood charged is a military offence, of which military courts alone have jurisdiction. These courts are provided for by acts of Congress, and are given cognizance of all crimes, disorders, and neglects of which officers and soldiers may be guilty.

Articles of War, XX, LXIV, and XCIX.

These courts are governed by well settled rules, and if a person is charged with a military offence, the military authorities have a right to detain him for trial, and, if found guilty, for punishment. The validity of his enlistment is a matter to be inquired into by the military court, if it is denied. He must, at least, abide the sentence of the military court, before he can be permitted to contest the validity of his enlistment.

Commonwealth *vs.* Gamble, 11 Serg. and Rawle, 93.

To allow a State judge to declare in advance of trial by a military court that the party was not properly enlisted, and thereupon to discharge him, would be subversive of all military discipline, and inconsistent with the exclusive right of the United States to establish tribunals for the trial of military offences. The question of desertion is the one that a court-martial has a right to try, and if the party be not guilty of desertion,

non constat, that he will be convictad. On the contrary, it must be presumed that the court will find properly.

The return of the officer that he held the prisoner under arrest upon a charge of desertion was a sufficient return to the writ, and should have been so adjudged.

In re Anderson, 16 Iowa, 599.

(Opinion of Dillon, J.)

Congress has not only given to the Secretary of War power to discharge persons mustered into the military service of the United States under the proper age, (eighteen years,) but has made it his imperative duty to do so "when it shall appear upon due proof that such persons are in the service without the consent, express or implied, of their parents or guardians."

Act of September 28, 1850, sec. 5, (9 Stat., 507.)

Act of February 13, 1862, sec. 2, (12 Stat., 339.)

Act of February 24, 1864, sec. 20, (13 Stat., 10.)

Act of July 4, 1864, sec. 5, (*Ibid* Stat., 380.)

It has been held that the power of discharging minors from the Army, thus given to the Secretary of War, takes from the courts all cognizance of such matters.

In re. John Riley, 1st Benedict, 408.

The mischiefs that would result, if any judicial officer of a State could by *habeas corpus* inquire into the

validity of the enlistment of every soldier of the United States Army who happened to be within the territorial jurisdiction of such officer, forbid the idea that Congress intended to allow soldiers to be discharged otherwise than as provided by statute.

Nicholls *vs.* United States, 7 Wallace, 131.

B. H. BRISTOW,

Solicitor General.